SUPREME COURT, U. S.

MAR 18 1968

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

PETITIONER,

v.

STATE OF ILLINOIS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

No. 1016

WAYNE DARNELL BUMPER,

PETITIONER,

v.

STATE OF NORTH CAROLINA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF F. LEE BAILEY AS AMICUS CURIAE

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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The consent of the attorneys for the respective petitioners has been obtained. The consent of the attorneys for the respective respondent-governments was requested but was not given. This brief is filed by order of the Court.

Interest of Amicus Curiae

The interest of *Amicus Curiae* in these cases arises from the fact that he is counsel to defendants in two cases presently pending in state appellate courts in which the same issue is before the court, namely, whether a State's exclusion from a jury of persons opposed to or with conscientious scruples against capital punishment violates the Sixth and Fourteenth Amendments to the United States Constitution. *Commonwealth* v. *George H. Nassar,* #13995, Supreme Judicial Court, Massachusetts; *Carl Coppolino* v. *State of Florida,* #67-193, Florida Appellate 2. In each of those cases, the defendant was not given the death sentence, although his jury was "qualified" on capital punishment. A more general interest of *Amicus Curiae* in these cases before this Court arises from the fact that he is a member of the criminal bar, specializing in capital cases, having represented the defendants in over 20 homicide cases, and is therefore greatly concerned with the administration of justice in capital cases.

Argument

I. By The Systematic Exclusion From The Jury Of Persons Who Were Opposed To Or Had Conscientious Scruples Against Capital Punishment, The Defendant Was Deprived Of A Jury Which Fairly Represented A Cross Section Of The Community, And Assured The Prosecution Of A Jury Whose Members Were Partial To The Prosecution On The Issue Of Guilt Or Innocence In Violation Of The Sixth And Fourteenth Amendments To The United States Constitution.

It is beyond dispute that, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas,* 311 U.S. 128 at 130, 61 S.Ct. 164 (1940); *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457 (1942). The systematic and intentional exclusion from a jury in a state court of any economic, social, religious, racial, political, or geographical group of a community is in violation of the Fourteenth Amendment to the Constitution of the United States. *Patton* v. *Mississippi,* 332 U.S. 463, 68 S.Ct. 184 (1947); *Norris* v. *Alabama,* 294 U.S. 587, 55 S.Ct. 579, (1935); *Eubanks* v. *Louisiana,* 356 U.S. 584, 78 S.Ct. 970 (1958); *Hernandez* v. *Texas,* 347 U.S. 475, 74 S.Ct. 667 (1954); *Thiel* v. *So. Pacific Co.,* 328 U.S. 217, 66 S.Ct. 984; *Labat* v. *Bennett,* 365 F.2d 698 (CA 5 1966) cert. denied, 35 U.S. Law Wk. 3272 (1967).

While the above cited cases have involved the intentional exclusion from juries of Negros (*Patton* v. *Mississippi,* supra; *Norris* v. *Alabama,* supra; *Eubanks* v. *Louisiana,* supra), Mexicans (*Hernandez* v. *Texas,* supra), wage earners (*Thiel* v. *S. Pacific Co.,* supra; *Labat* v. *Bennett,* supra), this Court has always made it clear in its opinions that

the intentional exclusion from a jury of any identifiable group of a community, is unconstitutional. See, e.g. *Thiel* v. *S. Pacific Co.*, 328 U.S. at 220.

People who are opposed to or have conscientious scruples against capital punishment are an identifiable political and social group. The Gallup public opinion survey released on July 1, 1966 indicates that more people in the United States are opposed to capital punishment than are in favor of it. *The Gallup Public Opinion Survey;* Princeton, New Jersey; July 1, 1966. That poll showed that 47% of the American people opposed the death penalty while only 42% are in favor of it. It also showed that the number of people opposed to capital punishment has increased steadily from 1965, from 1960, from 1953. The American Bar Association's *Project On Standards Relating to Fair Trial and Free Press* views qualified public opinion surveys as reliable indices of community views. *Project on Standards Relating to Fair Trial and Free Press,* Advisory Committee on Fair Trial and Free Press, American Bar Assoc., 1967.

In the instant cases, the respective trial courts permitted persons opposed to or with conscientious scruples against capital punishment to be excluded from the jury. By doing this, the trial court excluded an identifiable group of the community, thereby denying defendant the Equal Protection of the laws. If defendant had been charged with a non-capital offense, prospective jurors would not have been "qualified" on the death penalty.

The theory for "qualifying" a jury on the death penalty is to give the prosecution an impartial jury for the purpose of punishment. But, more fundamentally, defendant is entitled to an impartial jury on the issue of guilt or innocence. A defendant is prejudiced, whether or not he receives the death penalty, if he is tried by a jury "qualified" on capital punishment. Recent law review articles, citing numerous

psychiatric and other authorities, argue that, "The jury qualified in the death penalty is one more apt to convict, quite apart from the degree of punishment to be assessed . . . A defendant tried before such a jury is denied a fair trial on the *basic issue of guilt or innocence . . .*" *Oberer,* 39 Texas Law Review, 545 (1961). Professor Oberer's thesis, shared by Dr. Filmore H. Sanford, Professor of Psychiatry at the University of Texas, is that, "A jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hardly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach." 39 Texas Law Review at 549 [citing, among others, Adorno, et al., *The Authoritarian Personality* (1950)].

A recent North Carolina Law Review article said, "The Courts and legislatures . . . should be made aware of the psychological data indicating that a [death qualified] jury from which this large segment of society has been excluded, may result in prejudice to the defendant on the question of his guilt . . . hopefully, the Constitutional implications of this practice will lead to judicial decisions or legislation to the effect that these persons should no longer be excluded from the jury in capital cases." 45 N. Carolina Law Review, 1070, at 1076 (June, 1967). See also, Weihofen, *The Urge to Punish* (1956).

In McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania,* 30 Penn. B.A.Q. 250 (1959), it was said, "The end result [of a death qualified jury is that] in the most important criminal cases, to wit, murder, the jury consists of hard headed, conservative people, and, in effect, the defense must prove its innocence beyond all doubt. The necessity of the Commonwealth proving guilt

beyond a reasonable doubt is virtually abolished." 30 Penn. B.A.Q. at 258-259.

Introduced in the instant case of *Bumper* v. *No. Carolina*, No. 1016, was an affidavit containing the results of two relevant studies by psychologists, confirming that people not opposed to capital punishment are more likely to be partial to the prosecution on the issue of guilt or innocence than are people opposed to capital punishment. The prejudice of the death qualified jury is particularly invidious because it is unlikely that the jurors conscientiously realize they are biased to the prosecution.

The purpose of a jury of one's peers, representative of the community, is to keep contact between the people of the community and the law. "Qualifying" a jury on the death penalty prevents the community conscience from coming to bear on the *guilt* issue in capital cases. The result of a death "qualified" jury is that the *minority* point of view in the community is imposed in the trial. The result is that the extremists of the community are on the jury—those least in touch with modern ideas of criminal motivation and with the least dedication to human charity and understanding.

If a State deems it necessary that an impartial jury decide whether or not capital punishment should be imposed in a particular case, a bifurcated trial might be used. In a capital case, one jury, from which persons opposed to capital punishment would not be excluded, could decide the issue of the defendant's guilt or innocence, thus assuring a fair trial on that issue. A second jury, "qualified" on the death sentence, could decide the issue of punishment. California and New York already have provision for bifurcated trials. Cal. Penal Code § 190.1; N.Y. Penal Code § 1045-A.

II. Because "The Very Integrity Of The Fact-Finding Process" Is Involved When A Jury Is "Qualified" On The Death Sentence, The Unconstitutionality Of A State's Excluding From The Jury Persons Opposed To The Death Sentence Should Be Given Retroactive Effect.

Recent decisions of this Court concerning the retroactive application of a newly-discovered Constitutional rule have "concluded that retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.' *Linkletter* v. *Walker,* 381 U.S. 639; *Tehan* v. *Shott,* 382 U.S. at 416 . . ." *Johnson* v. *New Jersey,* 384 U.S. 719, 728, 86 S.Ct. 1772 (1966), citing *Gideon* v. *Wainright,* 372 U.S. 335 (1963), *Jackson* v. *Denno,* 378 U.S. 368 (1964). In *Parker* v. *Gladden,* 385 U.S. 363, 87 S.Ct. 468 (1966), this Court held that the accused had been denied his Constitutional right to a trial by an impartial jury and his conviction was reversed when he was seeking post-conviction relief. Similarly, in *Irvin* v. *Dowd,* 366 U.S. 317 (1960), and in *Sheppard* v. *Maxwell,* 384 U.S. 333, (1966), this Court reversed convictions on petitions for writ of habeas corpus because in the trial in each of those cases the finder of the truth, the jury, was likely prejudiced against the defendant.

In the instant case of *Witherspoon* v. *Illinois,* No. 1015, "the very integrity of the fact-finding process" is involved, and there is "the clear danger of convicting the innocent." Unlike the cases at bar, *Linkletter* v. *Walker, supra, Tehan* v. *Shott, supra, Johnson* v. *New Jersey, supra,* and *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967 (1967) did not involve "the core" of the constitutional right raised, 381 U.S. 630, nor were they involved with the unreliability of the finding of guilt. In *Linkletter, supra,* apparently the first case in

which this Court held a Constitutional ruling to be prospected only, 381 U.S. at 628, "the Court stressed that the prime purpose of the rule of *Mapp* v. *Ohio*, rejecting the doctrine of *Wolf* v. *Colorado*, as to the admissibility of unconstitutionally seized evidence, was 'to deter the lawless action of the police and to effectively enforce the Fourth Amendment.' 381 U.S. 637. There we could not 'say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved.' *Ibid.*" *Tehan* v. *Shott*, 382 U.S. at 413. In holding that *Griffin* v. *California*, 380 U.S. 609 (1965) should not be given retrospective application, this Court in *Tehan, supra*, said, ". . . the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of the judicial system . . ." 382 U.S., 415. In *Johnson* v. *New Jersey, supra*, involving the Constitutional right against coerced confessions, it was emphasized, ". . . the non-retroactivity of . . . [*Escobedo* v. *Illinois*, 378 U.S. 478 (1964), *Miranda* v. *Arizona*, 384 U.S. 436 (1966)] will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim." 384 U.S. 730. In *Johnson, supra*, the petitioners had already adjudicated the issue of the voluntariness of their confessions out of the presence of the jury, and, "In summation at the close of trial, defense counsel explicitly asserted that the confessions were truthful and pleaded for leniency on this ground." 384 U.S. 725. Finally, in *Stovall* v. *Denno, supra*, it was held that while the exclusionary rule set forth in *U.S.* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) was promotive of a fair trial, that rule ". . . undoubtedly will affect cases in which no

unfairness will be present,'' 388 U.S. 293, and thus did not require retroactive effect.

The instant cases involve ''the core'' of the Constitutional right to be tried before an impartial jury. As in *Sheppard* v. *Maxwell, supra, Irvin* v. *Dowd, supra, Parker* v. *Gladden, supra,* the reliability of the findings of guilt in these cases are suspect. Furthermore, as in *Sheppard* v. *Maxwell, supra,* the likelihood of unreliability in the finding of guilt because of the likelihood of prejudice in the jury should not require conclusive proof that the jury was prejudiced against the defendant.

It is true that, as in *Gideon* v. *Wainright, supra,* a holding for petitioner in *Witherspoon,* No. 1015, would result in the retrial of several cases. As in *Gideon* v. *Wainright, supra,* the interest of justice and the dangers of having convicted the innocent would require such a result. However, there are differences between the issue raised in *Witherspoon,* and that decided in *Gideon* which would make a holding for petitioner in *Witherspoon* less burdensome on the judicial system. In the first place, Gideon applied to all felony cases, a far larger number of cases than are involved in capital crimes. Secondly, one of the bases for the holding in *Gideon* was that the accused had been denied his right of effective confrontation of the evidence offered against him in his trial. Thus, in *Gideon* and in cases relying on *Gideon,* the retrial of the accused required that the prosecution present all of its evidence and witnesses anew. As much of the evidence had been lost, destroyed, or deteriorated, and as many witnesses were unavailable for retrial, the result in *Gideon* put some burden on the prosecution. Because *Witherspoon* does not involve the denial of the right to effective confrontation of testimony and other evidence *admitted into evidence in the court room,* there is no reason why on a retrial the prosecution, on proving that the witnesses or evidence offered in the earlier

trial are now unavailable, could not offer the transcript of the earlier trial as evidence. In this way, the burden on the prosecution would be greatly reduced, while the interests of justice would be satisfied.

Conclusion

For the foregoing reasons, I respectfully submit that this court hold in both of these cases that by the systematic exclusion from the jury of persons who were opposed to or had conscientious scruples against capital punishment, the defendants were deprived of a jury which fairly represented a cross section of the community, and assured the prosecution of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

I therefore respectfully urge that this court reverse the decisions below in these cases.

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Feb. 26, 1968

Certificate of Service

I, F. Lee Bailey, Esq., 40 Court Street, Boston, Massachusetts, hereby certify that I have air mailed, postage prepaid, pursuant to Rule 33(1) Rules of the Supreme Court of the United States, this brief to the counsel of record in the above entitled cases, this day of February, 1968.

F. Lee Bailey